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No. 02-1809

In The Supreme Court of the United States

J. ELLIOTT HIBBS,
Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, Arizona taxpayer, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALASKA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, IOWA, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MISSOURI, NEVADA, NEW JERSEY, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WEST VIRGINIA, WISCONSIN AND TERRITORY OF GUAM AS AMICI CURIAE IN SUPPORT OF PETITIONER

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ANDREA LYNN HOCH
Chief Assistant Attorney General
DAVID S. CHANEY
Senior Assistant Attorney General
RANDALL P. BORCHERDING
Supervising Deputy Attorney General
KRISTIAN D. WHITTEN
Deputy Attorney General*
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3664
Telephone: (415) 703-5589
Fax: (415) 703-5480
Counsel for Amici States
**Counsel of Record*

[Additional Counsel On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

GREGG D. RENKES
Attorney General of Alaska
P.O. Box 110300
Juneau, AK 99811-0300
(907) 465-3500

KEN SALAZAR
Attorney General of Colorado
1525 Sherman Street,
Seventh Floor
Denver, CO 80203
(303) 866-3577

M. JANE BRADY
Attorney General
of Delaware
820 North French Street
Wilmington, DE 19801
(302) 577-8400

CHARLES J. CRIST, JR.
Attorney General of Florida
The Capitol, PL 01
Tallahassee, FL 32399-1050
(850) 441-3300

THURBERT E. BAKER
Attorney General of Georgia
40 Capitol Square, SW
Atlanta, GA 30334-1300
(404) 656-3300

DOUGLAS B. MOYLAN
Attorney General of Guam
Judicial Center Building,
Suite 2-200E
120 West O'Brien Drive
Hagatna, Guam 96910
(671) 475-3409

MARK J. BENNETT
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813
(808) 586-1500

LAWRENCE G. WASDEN
Attorney General of Idaho
P.O. Box 83720
Boise, ID 83720-1000
(208) 334-2400

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street
Chicago, IL 60601
(312) 854-2503

THOMAS J. MILLER
Attorney General of Iowa
Hoover State Office Building
1305 East Walnut
Des Moines, IA 50319
(515) 281-5164

J. JOSEPH CURRAN, JR.
Attorney General
of Maryland
200 St. Paul Place
Baltimore, MD 21202-2202
(410) 576-6300

THOMAS F. REILLY
Attorney General
of Massachusetts
One Ashburton Place
Boston, MA 02108-1698
(617) 727-2200

MICHAEL A. COX
Attorney General of Michigan
P.O. Box 30212
Lansing, MI 48909-0212
(517) 373-1110

MIKE MOORE
Attorney General
of Mississippi
P.O. Box 220
Jackson, MS 39205-0220
(601) 359-3680

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101
(573) 751-3321

BRIAN SANDOVAL
Attorney General of Nevada
100 North Carson Street
Carson City, NV 89701
(775) 684-1100

PETER C. HARVEY
Attorney General
of New Jersey
Richard J. Hughes
Justice Complex
25 Market Street,
P.O. Box 080
Trenton, NJ 08625
(609) 292-4930

HARDY MYERS
Attorney General of Oregon
1162 Court Street, NE
Salem, OR 97301
(503) 378-4732

D. MICHAEL FISHER
Attorney General
of Pennsylvania
Sixteenth Floor,
Strawberry Square
Harrisburg, PA 17120
(717) 787-3391

HENRY MCMASTER
Attorney General
of South Carolina
P.O. Box 11549
Columbia, SC 29211-1549
(803) 734-4399

LAWRENCE E. LONG
Attorney General
of South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070
(605) 773-3215

GREG ABBOTT
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548
(512) 936-1822

MARK L. SHURTLEFF
Attorney General of Utah
236 State Capitol
Salt Lake City, UT
84114-0810
(801) 538-9600

DARRELL V. MCGRAW JR.
Attorney General
of West Virginia
State Capitol, Room 26-E
Charleston, WV 25305
(304) 558-2021

PEGGY A. LAUTENSCHLAGER
Attorney General
of Wisconsin
17 West Main Street
Madison, WI 53702
(608) 266-1221

QUESTION PRESENTED

Did the Ninth Circuit err in holding, in conflict with the First, Fifth, Sixth and Eleventh Circuits, that the Tax Injunction Act, 28 U.S.C. § 1341, and principles of comity that traditionally restrain federal judicial interference with state tax systems do not require district courts to dismiss constitutional challenges to state tax credits that directly impact the administration of a State's tax system?

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INTEREST OF AMICI STATES

> [T]he individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. . . . [T]hey would under the plan of the Convention retain that authority in the most absolute and unqualified sense; and . . . an attempt on the part of the national Government to abridge them in the exercise of it would be a violent assumption of power unwarranted by any article or clause of this Constitution.

The Federalist No. 32 (Alexander Hamilton).

The States' vigilance in protecting their tax administration from federal intrusion is historic and understandable. Their concern to preserve a proper federal-state balance of interests in the treatment of taxpayer suits cannot reasonably be questioned.

The Ninth Circuit's decision in this case works an improper change in that federal-state balance. It does so (1) by unreasonably construing the word "assessment" in the "Tax Injunction Act," 28 U.S.C. § 1341, to render the Act inapplicable to proceedings that seek to enjoin Arizona's *calculation* of assessments to include certain "credits" afforded under state law;[1] and (2) by rewriting the Tax Injunction Act to incorporate exceptions found in the distinct Anti-Injunction Statute, 28 U.S.C. § 2283.

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[1] The constitutional validity of the credits was confirmed by the Arizona Supreme Court in *Kotterman v. Killian*, 972 P.2d 606 (Ariz.), *cert. denied*, 528 U.S. 921, *cert. also denied by Rhodes v. Killian*, 528 U.S. 528 (1999). Amici take no position on the merits of the claim that the credits violate the Establishment Clause.

The Ninth Circuit's analysis conflicts with that of other circuits. *See ACLU v. Bridges*, No. 02-30493; 2003 WL 21362357 (5th Cir. June 11, 2003); *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237, 1242 (11th Cir. 1991); *United States Brewers Ass'n, Inc. v. Perez*, 592 F.2d 1212, 1215 (1st Cir. 1979); *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988). Inasmuch as the construction of the Tax Injunction Act should be uniform throughout the nation, Amici States urge the Court to grant the petition of the State of Arizona, resolve the circuit conflict, and restore the proper balance of federal-state interests in matters of state taxation that has been established both by Congress in the Tax Injunction Act and by this Court's own jurisprudence.

SUMMARY OF ARGUMENT

Writing for a unanimous Court in 1997, Justice Kennedy described the unadorned absoluteness of the Tax Injunction Act's bar to taxpayer efforts at using the federal courts to interfere with state tax administration: "The statute, on its face, yields no exception to the jurisdictional bar save where the state remedy is wanting. . . . " *Arkansas v. Farm Credit Services,* 520 U.S. 821, 823 (1997). Nevertheless, despite the statute's manifest simplicity and clarity, and rather than adhere to this Court's recognition that the Tax Injunction Act is rooted "in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations," *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976), the Ninth Circuit has held that a district court may enjoin a State's inclusion of tax credits in the calculation of a tax assessment, if those tax credits are alleged to violate the First Amendment's Establishment Clause.

There is no such exception to the Tax Injunction Act. The court's holding rested on two defective grounds: First, the court reasoned, the Act's bar against district court restraint of state tax "assessment" does not bar restraint of allowance for tax "credits." App. 16-17. And second, the court implied an exception to the Act's preclusive effect for circumstances requiring federal courts to act as "guardians of the peoples' federal rights." App. 21.

The effect of the court's ruling is to call into serious doubt the continuing vitality of the Act's federalism underpinnings. As the dissent from the granting of en banc review correctly observed, the Ninth Circuit's opinion "disdainfully tosses away all that the Supreme Court has said on the issues as mere dicta." App. 10. By parsing the State's tax assessment process into sub-activities – such as deduction of tax credits from gross tax liability – that may be individually restrained, the Ninth Circuit's reasoning threatens to eviscerate the preclusive effect of the Tax Injunction Act, one element at a time. Likewise, the court's rewriting of the Tax Injunction Act to include a qualification for First Amendment claims effectively creates an exception that virtually swallows the rule.

In order to protect the critical balance of state and federal interests so carefully crafted by Congress and this Court, Amici States believe that immediate review of the Ninth Circuit's decision is necessary.

ARGUMENT

THE PETITION OF THE STATE OF ARIZONA SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S NOVEL ANALYSIS OF THE TAX INJUNCTION ACT AND THE ACT'S FEDERALISM UNDERPINNINGS THREATENS TO RENDER THE ACT A NULLITY.

A. The Ninth Circuit's Approach To Construing The Express Terms Of The Tax Injunction Act Threatens The Independence Of State Tax Administration By Inviting Courts To Parse Tax Administration Activities Into Constituent Subactivities That May Be Reached In Defiance Of The Act.

The Tax Injunction Act, 28 U.S.C. § 1341, enacted in 1937, provides that "[t]he district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

The Act embodies Congress' agreement with this Court's "'scrupulous regard for the rightful independence of state governments,'" *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932), quoted in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 108 (1981), and with the Court's belief that federal "courts should adopt a hands-off approach with respect to state tax administration" where there is an adequate remedy at law. *Nat'l Private Truck Council v. Oklahoma Tax Commission*, 515 U.S. 582, 586 (1995). This Court has described the Tax Injunction Act as rooted "in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully*, 429 U.S. at 73; *see also Farm Credit Serv.*, 520 U.S. at 826-827; *Nat'l Private Truck Council*, 515 U.S. at 596; *Franchise Tax Board v. Alcan Aluminium Ltd.*, 493 U.S. 331, 338 (1990); *McNary*, 454 U.S. at 110; *California v. Grace Brethren Church*, 457 U.S. 393, 413 (1982); *Roswell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981).

Underlying the Court's early jurisprudence was a recognition of the fundamental importance of tax revenue to state sovereignty:

> In our constitutional system, the power of the State to tax is a concurrent power. "That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the union; that it is to be concurrently exercised by the two governments: are truths which have never been denied." *McCulloch v. Maryland*, 4 Wheat. 316, 425 (1819). The power to tax is basic to the power of the State to exist. *Wisconsin v. J. C. Penny Co.*, 311 U.S. 435, 444 (1940); *Roswell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522.

Farm Credit Serv., 520 U.S. 821, 826 (1997).

Using language that could hardly be clearer, this Court has noted that the Tax Injunction Act, "on its face, yields no exception to the jurisdictional bar save where the State remedy is wanting. . . ." *Farm Credit Serv.*, 520 U.S. at 823. But the Ninth Circuit sees it otherwise.

1. Ignoring the jurisprudential and federalism underpinnings of the Tax Injunction Act, *see e.g.*, App. 10 (Kleinfeld and O'Scannlain, JJ., dissenting from en banc review) (describing the panel's opinion as "disdainfully toss[ing] away all that the Supreme Court has said on the

issue as mere dicta . . ."), the Ninth Circuit erroneously restricted the broad reach of the statute. Focusing on the word "assessment," and selectively adopting a single dictionary definition of that term, the Ninth Circuit reasoned that the Act does not preclude federal court interdiction of an allowance of "credits" to an assessment, on the theory that such an interdiction has the effect of increasing, not diminishing, the collection of state tax revenue. *See* App. 16-17.

The reasoning is flawed. The amount of tax that is "assessed" by a State is the "bottom-line" amount that is owed by the taxpayer. *Cf.*, 26 U.S.C. § 6201(a)(1) ("[T]he Secretary shall assess all taxes shown on tax returns"), § 6203 ("[A]ssessment shall be made by recording the liability of the taxpayer.") Quite obviously, calculation of an "assessment" necessarily includes consideration of any available "credits" against the gross tax liability. A determination of whether a State's tax credits are properly available to a given taxpayer is part of the "entire plan or scheme fixed upon for charging or taxing." Webster's Third New International Dictionary 131 (1981). *See* Black's Law Dictionary 116-117 (6th ed. 1990). *See also Bridges*, 2003 WL 21362357 at 4-5; App. 3-5. Moreover, an injunction against an allowance of credits against liability is manifestly a restraint of the State's ability to calculate the ultimate assessment – a restraint that is precluded by the plain language of the Tax Injunction Act.

2. The Ninth Circuit's simplistic interpretation of the Tax Injunction Act is a bold assault on this Court's "hands-off policy with respect to state tax administration," *Nat'l Private Truck Council,* 515 U.S. at 586, and a clear threat

to state sovereign prerogatives in tax administration. The court's analysis suggests that the activities specified in the Tax Injunction Act – "assessment," "levy," and "collection" – may be parsed into constituent sub-activities that may themselves be restrained, even if the inclusive activity itself is immune from restraint under the Act. Indeed, rejecting as irrelevant this Court's reasoning in *Great Lakes Dredge & Dock Co. v. Hoffman*, 319 U.S. 293 (1943), and the Court's holding in *McNary*, 454 U.S. at 115, the Ninth Circuit reasoned that the tax credit at issue "is a limited discrete portion of the Arizona tax code that, if invalidated, would not substantially affect the administration of taxes in other ways. . . ." App. 26. The potential mischief of the court's analysis is manifest. If allowed to stand, the Ninth Circuit's approach threatens to eviscerate the Tax Injunction Act "from within" – incrementally exempting from its anti-injunction reach component parts of the expressly identified tax-administration activities, until the Act is effectively gutted of any force or effect at all. As this Court has observed, "the very maintenance of the suit itself would intrude on the enforcement of the state scheme." *McNary*, 454 U.S. at 114. Review by this Court, therefore, is critically warranted.

B. The Ninth Circuit's Improper Conflation Of The "Anti Injunction Act" And The "Tax Injunction Act" Threatens The Essential Federalism Underpinnings Of Congress' Guarantee Of State Taxing Independence.

Relying on this Court's opinion in *Mitchum v. Foster*, 407 U.S. 225 (1972), the Ninth Circuit justified its departure from the prohibition of the Tax Injunction Act and fundamental principles of comity by pointing to the role of

federal courts as "guardians of the people's federal rights". *See* App. 21 *quoting Mitchum*, 407 U.S. at 242. That reliance was misplaced.

Mitchum concerned the "Anti Injunction Act," 28 U.S.C. § 2283, not the "Tax Injunction Act." The former, unlike the Tax Injunction Act, provides: "A court of the United States may not grant an injunction to stay proceedings in a State court *except as expressly authorized by Act of Congress*, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." (Italics added). The Court in *Mitchum* held that 42 U.S.C. § 1983 is just such an express congressional exception to the Act's bar to federal court interference with state court proceedings. *See Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970) ("On its face the present [Anti Injunction] Act is an absolute prohibition against enjoining state court proceedings unless the injunction falls within one of the three specifically defined exceptions.").

In light of its limited holding in *Mitchum*, this Court did not invoke principles of comity in support of the State's position that such injunctions should not be permitted in any case. 407 U.S. at 242-243. ("[W]e conclude that, under the criteria established in our previous decisions construing the anti-injunction statute, § 1983 is an Act of Congress that falls within the 'expressly authorized' exception of that law. . . . In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. . . . Today we decide only that the District Court in this case was in error in holding that, because of the anti-injunction statute, it was absolutely without power in this § 1983 action to enjoin a

proceeding pending in a state court under any circumstances whatsoever."). See *id.* at 244 (Burger, C.J., concurring). This analysis, of course, has no application to the *Tax Injunction Act*, which by its terms suffers no similar federal-law, comity or federalism qualifications to its sweep.

Thus, in *McNary*, this Court expressly invoked principles of comity to support a broad reading of the Tax Injunction Act's bar to federal court interference with state tax administration. 454 U.S. at 116; *but see* 454 U.S. at 124 n.11 (Brennan, J., concurring) (citing *Mitchum* in rejecting application of comity principles). Indeed, in marked contrast to the Court's treatment of 42 U.S.C. § 1983 in *Mitchum*, this Court has held that claims predicated on the federal civil rights act will not support even state court interference with state tax administration where there is an adequate remedy at law. *Nat'l Private Truck Council*, 515 U.S. at 591.

The Ninth Circuit's reliance on *Mitchum* is misplaced; the court's justification, unsound. Like its tortured construction of the Tax Injunction Act itself, the court's rewriting of the Act to add qualifications to the Act's applicability threatens to undermine the balance of state and federal interests struck by Congress. Review of the Ninth Circuit's ruling is, therefore, urgently requested.

CONCLUSION

For the foregoing reasons, Amici States urge the Court to grant the petition for a writ of certiorari.

Dated: July 16, 2003

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ANDREA LYNN HOCH
Chief Assistant Attorney General
DAVID S. CHANEY
Senior Assistant Attorney General
RANDALL P. BORCHERDING
Supervising Deputy Attorney General
KRISTIAN D. WHITTEN
Deputy Attorney General
Counsel of Record
Counsel for Amici States